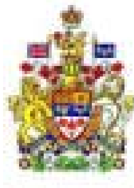
Federal Court of Appeal  Cour d'appel fédérale

Date: 20120305

Docket: A-402-10

Citation: 2012 FCA 73

CORAM: **BLAIS C.J.**
EVANS J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

**FOND DU LAC DENESULINE FIRST NATION,
BLACK LAKE DENESULINE FIRST NATION,
HATCHET LAKE DENESULINE FIRST NATION and
THE NON-FIRST NATION ABORIGINAL
PROVINCIAL COMMUNITIES OF
CAMSELL PORTAGE, URANIUM CITY, STONY RAPIDS
and WOLLASTON LAKE (hereinafter referred to as
the "Athabasca Regional Government")**

Appellants

and

**ATTORNEY GENERAL OF CANADA
and AREVA RESOURCES CANADA INC.**

Respondents

and

**CANADIAN NUCLEAR SAFETY COMMISSION and
ATTORNEY GENERAL FOR SASKATCHEWAN**

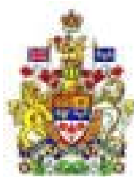
Intervenors

Heard at Saskatoon, Saskatchewan, on March 5, 2012.

Judgment delivered from the Bench at Saskatoon, Saskatchewan, on March 5, 2012.

REASONS FOR JUDGMENT OF THE COURT BY: EVANS J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT
(Delivered from the Bench at Saskatoon, Saskatchewan, on March 5, 2012)

EVANS J.A.

[1] This is an appeal by Fond du Lac First Nation and others (Appellants) from a decision of the Federal Court, dated September 22, 2010 and reported at 2010 FC 948. In that decision, Justice Russell (Judge) dismissed the Appellants' application for judicial review to set aside a decision of the Canadian Nuclear Safety Commission (Commission), dated June 30, 2009.

[2] In the decision at issue in these proceedings, the Commission renewed for a period of eight years the uranium mining and mill operating licence issued ten years earlier to AREVA Resources Canada Inc. (AREVA), a Respondent in this appeal. The licence related to AREVA's McClean Lake operation, situated in the Athabasca Basin of northern Saskatchewan. The Commission also revoked the Midwest uranium site preparation licence and incorporated into AREVA's McClean Lake licence the maintenance and caretaking activities at the Midwest site. AREVA owns the Midwest site, which is about fifteen kilometres from its McCLean Lake site.

[3] The Appellants' principal ground of appeal is that the Commission's decision was erroneous in law because it was made in breach of their constitutional right to be consulted before any action was taken by the federal Crown that might harm an Aboriginal or Treaty right protected by section 35 of the *Constitution Act, 1982*.

[4] The Appellants also allege that the Judge denied them a fair opportunity to make submissions before deciding not to recuse himself on the ground that his son was an articling student at the firm representing AREVA. The Judge disclosed the fact of his son's employment at

the start of the hearing and revealed that he had discussed the issue with his Chief Justice, who shared his view that recusal was not warranted.

[5] We are all of the view that the Judge acted entirely properly in deciding not to recuse himself. Judges need not hear submissions from the parties before deciding whether to recuse themselves on the basis of facts that they have themselves disclosed. A dissatisfied party's remedy is an appeal to this Court on the ground of bias. However, an appeal by the Appellants on the ground that the present facts constituted a reasonable apprehension of bias would have failed for lack of merit. In any event, the Appellants failed to raise the issue of bias at the earliest opportunity; they cannot delay their bias challenge in this Court until they have seen how the Judge decided their application for judicial review.

[6] Nor are we persuaded that the Judge made any error that would warrant the interference of this Court when he held that the Appellants had not established that any of them, including the three First Nations Appellants, had a right to be consulted on the facts of this case before the Commission renewed AREVA's licence under the *Nuclear Safety and Control Act*, S.C. 1997, c. 9, and revoked Midwest's licence and incorporated it into AREVA's.

[7] This appeal can be decided on relatively narrow grounds. First, we agree that before exercising its licensing powers the Commission had implicit jurisdiction to determine whether the Appellants had an Aboriginal right to be consulted on the licence renewal and if they did, whether it had been satisfied. Parliament should not be taken to have authorized the Commission to renew

AREVA's licence if the First Nations' constitutional right to be consulted had not been satisfied. The Appellants agree with this first point.

[8] Second, we agree with the Judge that the Appellants did not establish that a duty to consult arose on the present facts, because they failed to identify any potential harm to an Aboriginal or Treaty right that might be caused by the Commission's decision to renew AREVA's licence.

[9] True, the First Nations Appellants have existing Treaty rights to hunt and fish for food over an area of land that includes the McClean Lake and Midwest sites. However, they adduced no evidence that these Treaty rights might be harmed in some non-trivial manner by the licence renewal.

[10] It is important to note that, at the time of the licence renewal for McClean Lake, AREVA had been conducting mining operations at that site under a licence granted ten years earlier and had complied with its terms, including those relating to the protection of the environment. Neither the licence renewal, nor the revocation of the Midwest licence and its incorporation into AREVA's McClean Lake licence, expanded the scope of AREVA's permitted operations. It is mere speculation for the Appellants to allege that the continuation of mining under the renewed licence for another eight years, with a review after four, might so contaminate the wildlife as to harm the Treaty rights to hunt and fish of the First Nations Appellants.

[11] As we understand his argument, counsel suggests that the constitutional duty to consult is triggered by an existing Aboriginal or Treaty right of which the Crown had actual or constructive notice and that the duty requires that an inquiry be made as to whether proposed action might adversely affect the right.

[12] In our view, this is not the law. A duty to consult only arises when there is evidence of a possibility that the proposed action may harm an Aboriginal or Treaty right. The Commission found no such evidence in this case and, like the Judge, we can see no error in this conclusion. The brief discussion between Commission members and witnesses during the Commission hearing to which counsel referred us does not constitute evidence of potential harm that triggers a duty to consult.

[13] Since the Appellants have not shown that, despite the low threshold, a duty to consult was triggered by a demonstrated possibility of harm, cumulative or otherwise, to an Aboriginal or Treaty right, it is not necessary for us to express an opinion on any of the other issues decided by the Judge, and we decline to do so.

[14] For these reasons, the appeal will be dismissed with costs to the Respondents.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-402-10
STYLE OF CAUSE:	Fond du Lac Denesuline First Nation et al v. AGC et al. and Canadian Nuclear Safety Commission et al.
PLACE OF HEARING:	Saskatoon, Saskatchewan
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REASONS FOR JUDGMENT OF THE COURT BY:	BLAIS C.J., EVANS AND LAYDEN-STEVENSON JJ.A.
DELIVERED FROM THE BENCH BY:	EVANS J.A.

APPEARANCES:

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